Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

October Term, 1996

JACK R. CARPENTER, Jr.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

HOWARD BARRY GOODMAN
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QUESTIONS PRESENTED

1. Does the dismissal of a retirement-eligible Navy officer by a court-martial violate the Excessive Fines Clause of the Eighth Amendment?

2. Does the dismissal of a retirement-eligible Navy officer by a court-martial violate the Due Process Clause of the Fifth Amendment?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JACK R. CARPENTER, Jr.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Jack R. Carpenter, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The order of the Court of Appeals for the Armed Forces (App., *infra*, 1a) is unpublished. The opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 2a-12a) is also unpublished.

JURISDICTION

The Court of Appeals for the Armed Forces entered its judgment on February 26, 1997 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

Petitioner, on the date of his court-martial, was a retirement-eligible Navy Commander (0-5) with over 20 years of active service. The court-martial convicted him, pursuant to his guilty pleas, of ten specifications alleging violations of lawful general orders, 43 specifications alleging the making of false official statements, 20 specifications of larceny of government funds, 46 specifications of making false claims, one specification of conduct unbecoming an officer, two specifications of adultery, and seven specifications of theft of telephone services, in violation of Articles 92, 107, 121, 132, 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 921, 932, 933 and 934. He was sentenced to 30 months confinement, total forfeiture of pay and allowances, loss of all lineal numbers, and dismissal from the Navy. The convening authority approved the sentence and, except for the dismissal, ordered it executed, but suspended all confinement over 18 months and all forfeitures for the period of confinement plus 12 months. The Navy-Marine Corps Court of Criminal Appeals set aside and dismissed the finding of guilty to the charge and specification alleging conduct unbecoming an officer, affirmed the remaining findings of guilty, reassessed the sentence, and affirmed it. The Court of Appeals for the Armed Forces granted review of the two issues presented in this petition and summarily affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals.

REASON FOR GRANTING THE PETITION

The Court of Appeals for the Armed Forces and the Navy-Marine Corps Court of Criminal Appeals erroneously decided the questions presented.

A. The Excessive Fines Question

The Eighth Amendment to the U.S Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." At the time the Eighth Amendment was drafted and ratified, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense. *Alexander v. United States*, 509 U.S. 544, 558 (1993), *citing Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). Hence, "[t]he Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993), *quoting Browning-Ferris Industries*, 492 U.S. at 265 (emphasis in *Austin*).

Alexander, *Austin*, and *Browning-Ferris Industries* are the only three cases decided by this Court which define the scope of the Eighth Amendment's Excessive Fines Clause. *Alexander* held that an *in personam* forfeiture of real estate and business property under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, was the equivalent of a fine for purposes of the Excessive Fines Clause. 509 U.S. at 558-59. *Austin* held that an *in rem* civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) was a monetary punishment subject to the limitations of the Excessive Fines Clause. 509 U.S. at 604. *Browning-Ferris Industries* held that the Excessive Fines

Clause did not apply to punitive damage awards in cases between private parties. 492 U.S. at 260.

This Court has left it to the lower federal courts to determine whether a particular forfeiture is excessive. The Federal Circuit Courts of Appeal have not settled upon any clear rule to determine which forfeitures violate the Eighth Amendment. *United States v. Deninno*, 103 F.3d 82, 87 (10th Cir. 1996). The majority of the circuits which have addressed the question perform an analysis that purports to balance the severity of the fine (forfeiture) with the seriousness of the underlying offense and the culpability of the owner. *United States v. 829 Calle de Madero, Chaparral, N.M.*, 100 F.3d 734, 737-38 (10th Cir. 1996). Although there are differences between the tests articulated by the circuits which have adopted this approach, the tests roughly follow the same analytical process. *Id.* First, the instrumentality or nexus test examines the connection between the forfeited property and the offense. *Id.* The burden is on the Government to prove that the connection exists. *Id.* Second, the proportionality test compares the severity of the offense, the harshness of the sanction, and the culpability of the claimant. *Id.* The burden of showing excessiveness is on the claimant. *Id.*

The Navy-Marine Corps Court of Criminal Appeals held that petitioner's expected loss of retirement pay and benefits did not violate the Excessive Fines Clause of the Eighth Amendment. (App., *infra*, 7a-8a). The court concluded that the potential loss of retirement pay and benefits resulting from the dismissal of a retirement-eligible officer was not a "fine" within the meaning of the Excessive Fines Clause. *Id.* The court viewed the loss of retirement pay and benefits as merely a *potential consequence* of the court-martial conviction and sentence and not part of the sentence itself. *Id.* at 8a (emphasis in original).

The Court of Appeals for the Armed Forces summarily affirmed in light of its decision in *United States v. Sumrall*, 45 M.J. 207 (1996), *cert. denied*, 117 S.Ct. 961 (1997). *Sumrall* found that a retirement-eligible Air Force Captain's expected forfeiture of $600,000.00 in retirement pay resulting from his court-martial sentence of dismissal was neither excessive nor disproportionate in violation of the Eighth Amendment. *Id.* at 210. Captain Sumrall was convicted of two specifications alleging multiple and varied acts of sexual misconduct with a minor over a lengthy period of time. *Id.*

The decisions of the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces in petitioner's case are erroneous. The Navy-Marine Corps Court based its decision on the fact that the loss of retirement pay and benefits was not part of the court-martial's sentence, but was merely a potential consequence of the sentence because any adjudged dismissal would have to be approved and ordered executed by the Secretary of the Navy or a designate. (App., *infra*, 8a). The Court of Appeals for the Armed Forces in *Sumrall* did not see this as a problem:

> At the outset, we recognize that appellant was not sentenced to a forfeiture of his retirement pay or other retirement benefits. For that matter there is no express authorization in the Uniform Code of Military Justice or the Manual for Courts-Martial for the denial of retirement benefits. However, the Uniform Code of Military Justice does authorize punitive discharges (dismissal for officers -- *see* Arts. 66(b)(1) and 71(b)&(c)(1), UCMJ, 10 USC § 866(b)(1) and 871(b)&(c)(1), respectively) and appellant received that punishment. Moreover, in certain cases, a punitive discharge such as a

> dismissal might automatically trigger a loss of retirement benefits as a matter of statutory law not found in the Uniform Code of Military Justice. *See McCarty v. McCarty*, 453 U.S. 210, 222 n.14, 101 S.Ct. 2728, 2736 n.14 (1981); 5 USC § 8312 (loss of retired pay due to court-martial conviction for certain national security offenses); 38 USC § 5303(a) (loss of veterans benefits when dismissed from service by general court-martial). Finally, it has also been held that a dismissal effectively terminates a retired servicemember's entitlement to retired pay. *See Hooper v. United States*, 326 F.2d 982, 988 (Ct. Cl. 1964)(Admiral Hooper was tried in his retired status and was receiving retired pay -- *see generally United States v. Hooper*, 9 USCMA 637, 26 CMR 417 (1958)).
>
> In this context we are not inclined to overlook this issue simply because appellant's court-martial sentence did not expressly deny him retired pay. We recognize that the decision to retire an Air Force officer in appellant's grade and time in service rests by statute with his service secretary.

45 M.J. at 208-09.

While the Court of Appeals for the Armed Forces in *Sumrall* correctly declined to adopt the Navy-Marine Corps Court's "potential consequence" argument, it incorrectly decided the excessive fines issue. As the court in *Sumrall* was primarily concerned with the due process question, it gave little attention to the excessive fines issue:

> A related constitutional issue also arising in this case is whether the expected forfeiture of some $600,000 in retirement pay is "an excessive fine"

> within the meaning of the Eighth Amendment. *See Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801 (1993). Appellant argued before the Court of Criminal Appeals that a huge forfeiture of money for only 2 specifications of indecent acts with one girl was clearly "disproportionate." We note that the amount of retirement pay purportedly forfeited in this case is clearly speculative to the extent that it depends on a prediction of appellant's life expectancy. In any event, the 2 specifications of which appellant was convicted involved numerous diverse sexual acts committed with a minor by a military officer over a lengthy period of time. *See Alexander v. United States*, 509 U.S. 544, 113 S.Ct. 2766, 2776 (1993). We find no excessive or disproportionate forfeiture as prohibited by the Eighth Amendment in these circumstances.

45 M.J. at 210.

The Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces should have set aside petitioner's dismissal as an excessive fine under the Eighth Amendment. The expected forfeiture of military retired pay and benefits is a "fine" which was excessive under the circumstances of this case.

The expected forfeiture of military retirement pay and benefits is a "fine" for purposes of the Eighth Amendment Excessive Fines Clause. It is a "payment to a sovereign as punishment for some offense." *Alexander*, 509 U.S. at 558, *citing Browning-Ferris Industries*, 492 U.S. at 265. Petitioner had completed 20 years of commissioned service the month prior to his court-martial, and was thus retirement-eligible when convicted and sentenced. "An officer of the Navy . . . who applies for

retirement after completing more than 20 years of active service, of which at least 10 years was served as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President." 10 U.S.C. § 6323(a)(1). Such an officer is entitled to retired pay and other benefits. *See* 10 U.S.C. § 6323(e)(retired pay); 10 U.S.C. §1074(b)(medical and dental care); 10 U.S.C. §§ 1447-1455 (survivor benefit plan). Petitioner's court-martial sentence included dismissal from the naval service. If petitioner's dismissal is approved and ordered executed he will lose the opportunity to retire and to receive retirement pay and benefits. Petitioner's military trial defense counsel estimated the value to petitioner of this pay and benefits at $900,000.00. Enclosure (5) of LCDR McDonald's Clemency Letter of 27 Sep 94.

Petitioner's loss of $900,000.00 worth of retirement pay and benefits is excessive for the offenses of which he was convicted. Petitioner's charges stem primarily from one of his extramarital affairs. He used government telecommunications equipment and services to make $14,000.00 worth of personal telephone calls to facilitate the affair. He also made numerous false statements to procure official travel orders. He traveled on these orders to meet his paramour, submitted false travel claims on these orders, and received approximately $9,350.00 in liquidation of these claims. There is no connection between petitioner's offenses and his forfeited retired pay and benefits. Hence, the instrumentality or nexus test is not met. The proportionality test compares the severity of the offense, the harshness of the sanction, and the culpability of the claimant. Petitioner, in essence, committed a $23,350.00 larceny. He pleaded guilty without the protection of a pretrial agreement, and accepted full responsibility. (R. 20, 99, 196). He reaped no

monetary benefit from his offenses. He made full restitution before trial. (App., *infra*, 11a). Moreover, the loss of petitioner's retirement pay and benefits would impose undue hardship on petitioner's former wife and two children. Petitioner, in his marital separation agreement, assigned to his former wife any and all entitlement to any future retirement pay and benefits. *Id.* at 9a. Under these circumstances the loss of $900,000.00 of retired pay and benefits is excessive.

B. The Due Process Question

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" This clause applies to service members at courts-martial. *United States v. Graf*, 35 M.J. 450, 454 (C.M.A. 1992), *cert. denied*, 510 U.S. 1085 (1994), *citing Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The hallmark of a property interest is an individual entitlement, grounded in law, which cannot be removed except for cause. *Logan v. Zimmerman*, 455 U.S. 422, 430 (1982). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible,

relating to "the whole domain of social and economic fact." *Id.*

Due process is not a technical concept with a fixed content unrelated to time, place and circumstances. *Mathews v. Eldridge*, 424 U.S. at 334. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* Accordingly, resolution of the issue of whether procedures are constitutionally sufficient requires a balancing of the affected government and private interests. *Id.* at 334-35. Three distinct factors must be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

Petitioner challenged his dismissal in the lower appellate courts as a violation of the Due Process Clause of the Fifth Amendment. Petitioner argued (1) that his sentencing hearing was inadequate because the military judge did not consider the monetary value of his expected retirement pay and benefits and (2) that the military judge failed to set forth his reasons for adjudging a dismissal.

The Navy-Marine Corps Court of Criminal Appeals rejected both of petitioner's arguments. The court held (1) that court-martial presentencing procedures complied with due process and (2) that sentencers need not state why a dismissal was adjudged. (App., *infra*, 8a-11a). The court noted that petitioner never sought to introduce evidence at trial of the value of his retired pay and benefits and that the military judge had no *sua sponte* obligation to obtain such information. *Id.* The court found petitioner's argument flawed because retirement pay and benefits do

not vest once the officer reaches retirement eligibility. (App., *infra*, 9a-10a).

The Court of Appeals for the Armed Forces summarily affirmed in light of its decision in *Sumrall*. *Sumrall* held that a retirement-eligible Air Force officer was not denied due process by a court-martial sentence which included a dismissal and deprived him of expected retired pay and benefits. 45 M.J. at 208. The court noted that a substantial question existed regarding whether the appellant had a property interest in his expected retired pay and benefits. *Id.* at 209. The court assumed that the appellant had such an interest, but found that he had been afforded due process:

> Assuming he does have such an interest, the next question in this case is whether he was afforded due process at his court-martial with regard to their taking or denial. *See Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 262, 107 S.Ct. 1740, 1747, 95 L.Ed.2d 239 (1987). The potential loss of retirement benefits was a proper matter for consideration by factfinders at appellant's court-martial. *See generally* RCM 1001(c)(1)(B), Manual for Courts-Martial, United States, 1984 (defense may present matters in mitigation "to lessen the punishment to be adjudged by the court-martial"). This Court has particularly held that retirement-eligible servicemembers are entitled to put into evidence that a punitive discharge would deny them retirement benefits. *United States v. Griffin*, 25 MJ 423 (1988). Furthermore, servicemembers associated with loss of retirement pay, subject to foundational requirements related to the reliability of their projections, may present evidence of the potential dollar amount subject to loss. *Id.*; *cf.*

> *United States v. Henderson*, 29 MJ 221 (CMA 1989). Accordingly, to the extent that a dismissal affects retirement benefits including pay, we conclude these procedures satisfy the meaningful opportunity to be heard concerns of the Due Process Clause. *See generally Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed. 1 (1994); *Brock v. Roadway Exp., Inc.*, *supra*.

45 M.J. at 209.

The decisions of the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces in petitioner's case are erroneous. Retirement-eligible Navy officers have a property interest in their expected retirement pay and benefits and existing court-martial sentencing procedures do not afford them adequate due process protections.

Retirement-eligible Navy officers have a property interest in their expected retirement pay and benefits. They have "an individual entitlement, grounded in . . . law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman*, 455 U.S. at 430. A Navy officer who completes 20-years of active service may apply for retirement. *See* 10 U.S.C. § 6323(a)(1). Any officer retired under this section is entitled to retired pay and other benefits. *See* 10 U.S.C. § 6323(e)(retired pay); 10 U.S.C. § 1074(b)(medical and dental care); 10 U.S.C. §§ 1447-1455 (survivor benefit plan). Such an officer cannot be involuntarily separated except for cause. *See generally* 10 U.S.C. §§ 1181-1187 (Separation of Regular Officers for Substandard Performance of Duty or for Certain Other Reasons); SECNAVINST 1920.6A (Administrative Separation of Officers). This statutory and regulatory scheme creates an entitlement to retirement pay and

benefits sufficient to qualify as a "property interest" for due process purposes.

Before a general court-martial may dismiss a retirement-eligible officer it must consider the full nature and value of expected retirement pay and benefits. This is the only way the court-martial can intelligently assess the propriety of adjudging a dismissal. Application of the three-part test in *Mathews v. Eldridge*, 424 U.S. at 334, supports this position:

1. The private interest at stake is the accused officer's expectation of retirement pay and benefits. This is a valuable asset -- probably the officer's most valuable single asset.

2. If a sentencer is not aware of the exact nature and value of this asset, there is a substantial risk that it will assess an unintended penalty. The added procedural safeguard of requiring the sentencer to consider the nature and value of the accused's expected retirement pay and benefits ensures that the punishment imposed was the punishment intended.

3. The Government has a strong interest in accurate sentencing. If the sentencer is allowed to adjudge dismissal of a retirement-eligible officer without knowing the financial consequences of its decision, there is a substantial risk that the sentence will later be impeached when the sentencer learns of the unintended consequence of its decision. Furthermore, there is no significant fiscal or administrative burden to the government in providing this information to the sentencing authority. *See United States v. Lee*, 43 M.J. 518, 522 (A.F.Ct.Crim.App. 1995), *aff'd*, __ M.J. ___ (1996), *cert. denied*, 117 S.Ct. 961 (1997) (approximating a potential financial loss from a punitive discharge is not an impractical task)(Becker, J., concurring in the result). Presentation of this information to the sentencer could be easily handled in the same way

that information about military pay is presented -- announcement by the trial counsel at the start of the sentencing hearing. *See* Manual for Courts-Martial, United States (1995 ed.)(MCM), Rules for Courts-Martial (R.C.M.) 1001(a)(1)(A)(i)(trial counsel shall ordinarily present the service data relating to the accused taken from the charge sheet); MCM at A4-1 (service data from charge sheet includes total pay subject to forfeiture).

Petitioner's failure to offer evidence of the value of his retirement pay and benefits during the sentencing portion of his court-martial does not waive the issue. The Rules for Courts-Martial do not expressly address the admission of such evidence during the sentencing hearing, *see* R.C.M. 1001, and the case law prior to *Sumrall* was ambiguous. *See generally United States v. Blake*, 30 M.J. 184 (C.M.A. 1990)(Government may use evidence of future value of money stolen by accused to rebut evidence of future value of accused's retirement pay); *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989)(effect of punitive discharge on retirement benefits of servicemember who was not retirement eligible was inadmissible as collateral administrative consequence); *United States v. Griffin*, 25 M.J. 423 (C.M.A.), *cert. denied*, 487 U.S. 1206 (1988)(not error for court, with accused's consent, to instruct members on effect of punitive discharge on accused's eligibility for retirement benefits); *Lee*, 43 M.J. at 521 n.6 (The Court of Military Appeals has reserved opinion on whether an actuarial estimate of the value of retirement benefits could be relevant evidence in sentencing). Furthermore, as no retirement-eligible officer can be properly sentenced to a dismissal without consideration of this information, the court-martial has a *sua sponte* duty to obtain it, even if it is not offered by the accused. Just as the court-martial must consider the amount of the accused's pay prior to adjudging forfeitures,

so must it consider the value of a retirement-eligible officer's expected retirement pay and benefits. Therefore, any adjudication of dismissal of a retirement-eligible officer by a court-martial that did not consider the full value of the accused's expected retirement pay and benefits violates the Due Process Clause of the Fifth Amendment and cannot be affirmed.

The military judge did not state the reason why he adjudged dismissal in petitioner's case. A decision maker must base his decision on the law and the evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. *Id.*; *see also Bandoy v. Commandant of Fourth Naval Dist.*, 495 F. Supp. 1092 (E.D. Pa. 1980)(Navy's failure to provide any statement of reasons for denying hardship discharge violated due process). This "reasons requirement" is necessary to preserve the due process right of meaningful review. *Id.* at 1095. A retirement eligible officer dismissed at general court-martial has a right to appellate review of the appropriateness of his sentence by a Court of Criminal Appeals. *See* UCMJ, art 66(c), 10 U.S.C. § 866(c). The only way for a Court of Criminal Appeals to review the propriety of the adjudged dismissal is to know the military judge's reasons for adjudging it. The absence of such reasons from the record violates petitioner's Fifth Amendment right to due process.

Application of the three-part test in *Mathews v. Eldridge*, 424 U.S. at 334, provides additional support for this position:

1. The private interest at stake is the accused officer's expectation of retirement pay and benefits. This

is a valuable asset -- probably the officer's most valuable single asset.

2. The sentencer under the current procedure is not required to state the reason why it sentenced a retirement-eligible officer to dismissal. This prevents appellate authorities from accurately assessing the legality and propriety of the adjudged dismissal. The added procedural safeguard of having the sentencer state its reason for adjudging dismissal of a retirement-eligible officer ensures meaningful appellate review and ultimately ensures the propriety of the approved punishment.

3. The Government has a strong interest in accurate sentencing and meaningful appellate review. Both would result from requiring the sentencer to state its reason for adjudging a dismissal. Furthermore, there is virtually no fiscal or administrative cost to this additional safeguard. Judges and court-martial members are intelligent and literate people who could easily provide a concise written rationale for such an important decision.

In summary, petitioner is a retirement-eligible officer sentenced to dismissal in violation of the Due Process Clause of the Fifth Amendment. Petitioner has a property interest in his expected retirement pay and benefits because by statute and regulation he cannot be separated except for cause. The court-martial that sentenced petitioner did not consider the nature and value of his retirement pay and benefits and did not state any reason why a sentence that included dismissal was adjudged.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 96-1289/NA

Crim. App. No. 94-1878

UNITED STATES, Appellee

v.

JACK R. CARPENTER, Jr. (536-56-8121), Appellant

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, in light of *United States v. Sumrall*, No. 95-0720 (Sept. 30, 1996), it is, by the Court, this 26th day of February, 1997,

ORDERED

That said petition is hereby granted on Issues I and II as raised by appellate defense counsel; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (GOODMAN)
Appellate Government Counsel (LIVINGSTON)

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

BEFORE

J.E. DOMBROSKI T.D. KEATING
WILLIAM J. LUCAS

UNITED STATES

v.

Jack R. CARPENTER, Jr., 537 56 8121
Commander (0-5), U.S. Navy

NMCM 94 01878 Decided 24 June 1996

Sentence adjudged 15 July 1994. Military Judge: H.K. Jowers. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Charleston, SC.

LCDR HOWARD B. GOODMAN, JAGC, USN, Appellate Defense Counsel

LT JOHN R. LIVINGSTON, Jr., JAGC, USNR, Appellate Government Counsel

DOMBROSKI, Chief Judge:

We have examined the record of trial, the assignments of error,[1] and the Government's response thereto, and the

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[1] I. THE SPECIFICATION UNDER CHARGE V, ALLEGING THAT APPELLANT "HOSTED" A WOMAN, NOT HIS WIFE, AT HIS CHANGE OF COMMAND, FAILS TO STATE AN OFFENSE.

II. THE STAFF JUDGE ADVOCATE WAS DISQUALIFIED FROM PREPARING THE POST-TRIAL RECOMMENDATION.

III. AN UNSUSPENDED DISMISSAL IS INAPPROPRIATELY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE.

IV. THE UNSUSPENDED DISMISSAL OF APPELLANT, A RETIREMENT ELIGIBLE OFFICER, CONSTITUTES AN EXCESSIVE FINE IN VIOLATION OF THE EIGHT AMENDMENT TO THE U.S. CONSTITUTION.

V. ALL THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED BECAUSE OF UNLAWFUL COMMAND INFLUENCE. SEE MOTION FOR DISMISSAL, ENCL (2) TO THE DEFENSE RESPONSE TO THE SJA'S RECOMMENDATION AND REQUEST FOR CLEMENCY, DTD 27 SEP 94; BUT SEE ADDENDUM TO SJA'S RECOMMENDATION, DTD 30 SEP 94.

VI. APPELLANT WAS TRIED IN VIOLATION OF UCMJ, ARTICLE 34 WHERE THE STAFF JUDGE ADVOCATE FAILED TO PREPARE A NEW PRETRIAL ADVICE LETTER AFTER ALL THE CHARGES ON THE ORIGINAL CHARGE SHEET WERE DISMISSED AND ALL NEW CHARGES WERE PREFERRED. (CITATIONS OMITTED.)

VII. THE CONVENING AUTHORITY ABUSED HIS

points raised at oral argument. We have concluded that except with regard to the first assignment of error and the charge of conduct unbecoming an officer and gentleman, the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

Background

Pursuant to his pleas of guilty, the appellant was convicted by a general court-martial, military judge alone, of violating lawful general orders of the Secretary of the Navy and the Office of Government Ethics (10 specifications), making false official statements (43 specifications), larceny of military property (20 specifications), fraudulent claims against the United States (46 specifications), conduct unbecoming an officer and gentleman (1 specification), adultery (2 specifications), and obtaining services under false pretenses (7 specifications), in violation of Articles 92, 107, 121, 132, 133 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892, 907, 921, 932, 933, and 934 respectively. The adjudged sentence included confinement for 30 months, total forfeitures, loss of lineal precedence, and dismissal. The military judge recommended that execution of confinement in excess of 18 months and all forfeitures be suspended conditioned on the appellant establishing and maintaining an allotment of all pay and allowances in favor of his wife and children. The convening authority

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DISCRETION BY DENYING APPELLANT'S REQUEST FOR AN ADDITIONAL TEN DAYS IN WHICH TO RESPOND TO THE STAFF JUDGE ADVOCATE'S POST-TRIAL RECOMMENDATION. (CITATIONS OMITTED.)

approved the sentence and partially suspended execution in conformity with the military judge's recommendation. There was no pretrial agreement. Before this Court, the appellant makes eight assignments of error. As noted above, we find merit only in the first assignment of error.

A naval academy graduate and the commanding officer of a naval destroyer, the appellant was one of the Navy's fast-rising stars, named to receive the prestigious Stockdale award before the misconduct underlying the charges in this case came to light. The appellant's charges stem primarily from two extramarital affairs, one in particular. In the course of the providence inquiry, the appellant related that over a two-year period, he engaged in sexual relations with two women, AW and VW, while he was married to someone else. The ship he commanded held a telephone credit card, which the appellant used on numerous occasions to make personal calls. He also used the ship's International Maritime Satellite Telecommunications System [INMARSAT] for personal calls. These personal calls utilized government equipment and services totalling in excess of $14,000.00. The appellant also made numerous false statements to personnel of his command regarding his need for official travel orders. He made the trips on official orders for personal reasons (his extramarital affairs) and then submitted false travel claims, receiving cash and checks for some 20 trips totaling about $9,350.00.

Conduct Unbecoming an Officer

The specification of Charge V alleges that the appellant did "behave himself in an improper manner, by hosting

[AW], a woman not his wife, in front of the crew of USS JOHN RODGERS (DD 983), as well as guests attending the change of command of said ship, including representatives of the Chilean Armed Forces, to the disgrace of the armed forces." The appellant contends that the specification, on its face, failed to allege an offense, and so he could not providently plead guilty.

In *United States v. Norvell*, 26 M.J. 477, 480 n.2 (C.M.A. 1988), the Court of Military Appeals noted that an "[a]ppellant's standing to challenge a specification on appeal after a voluntary plea of guilty is considerably less than if [the appellant] had put the Government to its proof. *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); *United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984)." After citing the test for legal sufficiency of a pleading as set forth in *United States v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202 (1953),[2] the Court in *Norvell* opined that "[i]f the specification pleads conduct which is facially innocuous, the fact that the accused pleaded guilty to the charge will not save it for the Government." 26 M.J. at 480 (citation omitted); *see also United States v. Kroop*, 38 M.J. 470 (C.M.A. 1993); Manual for Courts-Martial (1995 ed.), Part IV, ¶ 59(c).

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[2]"The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Furthermore, when the pleadings have not been attacked prior to findings and sentence, it is enough to withstand a broadside charge that they do not state an offense, if the necessary facts appear in any form or by fair construction can be found within the terms of the specification." *See* 3 C.M.A. 206, 11 C.M.R. at 206.

We conclude that the specification, on its face, pleads conduct that is facially innocuous. The allegation that the appellant "hosted" a woman not his wife at his change-of-command ceremony does not, on its face, implicate any form of conduct unbecoming an officer. Indeed, a commanding officer "hosts" all the guests attending an official function on his ship, be they male, female, related or unrelated to the officer. When we look to the providence inquiry for any additional content for the act of "hosting," we find that the appellant stated that AW attended his change-of-command ceremony in Valparaiso, Chile; that he did not hold her out to be his wife, and there were people in attendance who knew she was not appellant's wife; that she sat in an assigned seat, attended the reception on board the ship, and left in a car with the appellant. Record at 95-97. Based on these facts, we cannot affirm the finding of guilty of conduct unbecoming an officer. We will reassess the sentence.

The Sentence

In Assignments of Error III, IV, and VIII, the appellant challenges his sentence, which includes an unsuspended dismissal, on grounds that an unsuspended dismissal is inappropriately severe and, since appellant was a retirement-eligible officer, the sentence violates the Eighth and Fifth Amendments to the United States Constitution. We find no merit in these assignments.

We turn first to the appellant's claim that an unsuspended dismissal of a retirement-eligible officer constitutes an excessive fine in violation of the Eighth Amendment to the U.S. Constitution. The appellant cites two U.S. Supreme Court forfeiture cases, which applied the Eighth Amendment's excessive fine limitation, as support for his

contention that his potential loss of retirement benefits from a dismissal is similarly limited by the Eighth Amendment. In the first instance, we do not agree that the Racketeer Influenced and Corrupt Organizations (RICO) Act *in personam* forfeiture at issue in *Alexander v. United States*, 509 U.S. 544 (1993) and the *in rem* civil forfeiture at issue in *United States v. Austin*, 509 U.S. 602 (1993) are analogous to the potential loss of retirement benefits as a result of an executed court-martial sentence of dismissal of a retirement-eligible officer. To characterize the latter as a fine and a punishment of the court-martial ignores the fact that the loss of retirement benefits is a *potential consequence* of the conviction and sentence and not part of the sentence itself. Further, the Secretary of the Navy or a designate must approve and order executed the dismissal of a commissioned officer. Rules for Courts-Martial [R.C.M.] 1113(c)(2); 1206. The U.S. Air Force Court of Criminal Appeals has recently considered this issue in *United States v. Lee*, 43 M.J. 518 (A.F.Ct.Crim.App. 1995), rejecting a constitutional challenge to a dismissal as constituting an excessive fine under the Eighth Amendment. We reach the same conclusion in this case.

The appellant additionally argues that the dismissal of a retirement-eligible officer violates the due process clause of the Fifth Amendment to the United States Constitution. Appellant contends that the statutory and regulatory scheme for regular commissioned officers "creates an entitlement to retirement pay and benefits sufficient to qualify as a 'property interest' for due process analysis." Supplemental Brief and Assignment of Error on Behalf of Appellant at 4. Appellant claims that his dismissal violates due process because the military judge did not consider the actuarial value of his potential retirement benefits and because the military judge did not state reasons for

adjudging a dismissal.

Initially, we note that the appellant did not seek to introduce at trial any evidence regarding the specific actuarial value of retirement benefits, were he to lose these benefits as a result of execution of the punishment of dismissal.[3] As a retirement-eligible officer, we believe it was open for the appellant to introduce such evidence on sentencing. *See United States v. Griffin*, 25 M.J. 423 (C.M.A.), *cert. denied*, 487 U.S. 1206 (1988); *compare United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989) (accused was not retirement eligible). *See also United States v. Lee*, 43 M.J. at 521 n.6. In any event, there was evidence before the military judge regarding the appellant's service status and financial status, including a separation agreement whereby the appellant's wife would receive, *inter alia*, all the appellant's retirement pay. Record at 235; Defense Exhibit C at 4. We may presume that the military judge was aware of the collateral consequences of an executed dismissal, including the loss of "substantially all benefits administered by the Veteran's Administration and the [Navy] establishment." Military Judges' Benchbook, DA Pam. 27-9, Update Memo 11 of 19 July 1994, page 2-136. Notwithstanding, appellant argues that the military judge had a *sua sponte* duty to obtain information regarding the actuarial value of the appellant's potential retirement benefits.

A fundamental flaw in the appellant's due process argument is the notion that the prospective retirement benefits of a retirement-eligible officer become a vested

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[3]In his brief, the appellant indicates that the actuarial value of his retirement benefits is $900,000.00. Supplemental Brief and Assignment of Error on Behalf of Appellant at 2.

property right at the time the officer becomes retirement-eligible. The Government correctly points out that under the statute, an officer must be "an officer of the Navy or Marine Corps" to be retired at the discretion of the President. 10 U.S.C. § 6323. When officer status is terminated by reason of an approved and executed dismissal, the individual is no longer "an officer of the Navy or the Marine Corps" and eligibility to receive retirement benefits ceases. This is more than a semantic exercise. Continued honorable service is a requirement for commissioned officer status, even in retirement. *See McCarty v. McCarty*, 453 U.S. 210 (1981) (military retired pay characterized as reduced compensation for reduced current service). Dishonorable service resulting in an approved and executed dismissal adjudged by a general court-martial terminates officer status and the rights and privileges attending thereto.

It is difficult to conceive how a general court-martial and the presentencing procedure prescribed in our rules could be viewed as falling short of the requirements of due process under the Fifth Amendment to the U.S. Constitution. *See* R.C.M. 1001. Indeed, the military rules even permit an unsworn statement from an accused and relaxation of the rules of evidence for admission of matters in extenuation and mitigation. R.C.M. 1001(c)(2) and (3). The appellant never sought to introduce the actuarial value of a possible future stream of income from retirement pay. We can find no precedent to even remotely suggest that the military judge has a *sua sponte* duty to obtain such information. Likewise, we do not view due process as requiring a court-martial to state reasons for adjudging a

dismissal or any other form of punishment.[4] Sentence determination is within the discretion of the court-martial, subject to the limitations set forth in the Manual for Courts-Martial. R.C.M. 1002. Except in very limited circumstances, polling of members (and, by analogy, questioning of the military judge in a trial by military judge alone) concerning deliberation and voting on a sentence are prohibited. R.C.M. 1007(c) and 1008. In trials before members, instructions on sentence normally include the following: "[Y]ou alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society." Military Judge's Benchbook, DA Pam. 27-9, Update Memo 11 of 19 July 1994, page 2-144. In trials by court-martial, sentence appropriateness is determined by the sentencing authority, based on an individualized consideration of the offender and the nature and seriousness of the offenses committed. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We conclude that due process under the Fifth Amendment does not impose an additional requirement for the sentencing authority to rationalize all or any part of a sentence.

We note that the appellant pled guilty without benefit of a pretrial agreement. He made restitution to the United States for the monetary value of the personal telephone calls and fraudulent travel claims. We also note his stellar record of professional performance before these offenses came to light and the adverse impact on the appellant's

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[4]The only exception is in capital cases wherein a sentence of death may not be adjudged unless the members find beyond a reasonable doubt one or more of the aggravating factors set forth in the rules. R.C.M. 1004.

family should he lose all retirement benefits as a result of his conviction and sentence. We nevertheless conclude that a dismissal is an entirely appropriate punishment for the offenses and for this appellant, given the number and nature of offenses and the fraud and abuse of official position as a commanding officer inherent in the appellant's misconduct. *See Snelling*, 14 M.J. 267 (C.M.A. 1982); *see also United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). Assignments of Error III, IV, and VIII are without merit.

Remaining Assignments of Error

We have carefully considered the remaining assignments of error, II, V, VI, and VII, and conclude that they are without merit.

Conclusion

The findings of guilty of Charge V and its Specification, a violation of Article 133, UCMJ are set aside and that Charge and Specification are dismissed. The remaining findings of guilty are affirmed. Upon reassessment of the sentence, we find the sentence appropriate for the remaining offenses and for this appellant. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Accordingly, the sentence is affirmed.